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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Thomas DROOG ET AL.-1 (PCT) (DIV)
SERIAL NO: 10/706,797 EXAMINER: HUYNH, Louis K.
FILED: November 12, 2003 GROUP: 3721
TITLE: BAG FILLING APPARATUS AND METHOD

**LETTER TRANSMITTING SUBSTITUTE BRIEF ON APPEAL IN RESPONSE TO
NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF (37 CFR 41.37)**

MAIL STOP: APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In response to the Notification of Non-Compliant Appeal Brief (37 CFR 41.37) dated July 6, 2005, enclosed is Appellant's [Substitute] Brief on Appeal. As the official fee for filing a Brief on Appeal was enclosed with the Appeal Brief submitted on June 9, 2005, it is believed that no fee is due at this time. The Commissioner is hereby authorized to charge any deficiencies or credit any overpayment to Deposit Account No. 03-2468.

Respectfully submitted,
Thomas DROOG ET AL.-1 (PCT) (DIV)

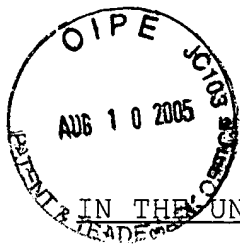
COLLARD & ROE, P.C.
1077 Northern Boulevard
Roslyn, New York 11576
(516) 365-9802

Allison C. Collard, Reg. No. 22,532
Edward R. Freedman, Reg. No. 26,048
Frederick J. Dorchak, Reg. No. 29,298
Attorneys for Applicants

Enclosure: [Substitute] Brief on Appeal

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, PO Box 1450 Alexandria, VA 22313-1450, on August 8, 2005.


Maria Guastella



PATENT

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[SUBSTITUTE] BRIEF ON APPEAL

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellant hereby appeals the Examiner's Final Rejection of claims 48-51 and 58-60, dated October 13, 2004.

I. REAL PARTY IN INTEREST

The real party in interest in this appeal is the Applicant Boss Packaging Inc., owner of the rights of the application by virtue of an Assignment signed October 12, 2004 (hereinafter the "Appellant").

II. RELATED APPEALS OR INTERFERENCES

No related appeals or interferences exist.

III. STATUS OF CLAIMS

Claims 1 to 47 are cancelled. Claims 48-51 reside in the application. Claims 52-57 are cancelled. Claims 58-60 reside in the application. Claims 48-51 and 58-60 are rejected in a Final Rejection dated October 13, 2004. A copy of the Claims are Appendixed hereto.

IV. STATUS OF AMENDMENTS

An Amendment under 37 CFR 1.116, filed February 17, 2005, has been entered for purposes of this appeal.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Appellant's first independent claim in issue (claim 48) for this appeal is directed to a method of filling a bag 46 with a material and sealing a bag 46; the method comprising the steps of (a) providing an empty collapsed bag 46 on a bag holder 44, 202 (pg. 10, lines 5, 6, 9, 14, 16, 18, 22 and pg. 13, line 21; Fig. 1, 3 and 7-10); (b) opening the bag 46 (pg. 13, lines 21-25; Fig. 2 and 7(b)); (c) filling the bag 46 with material (pg. 13, lines 25-26; Fig. 7(c)-(f)); (d) grasping the opposed top edges of the bag 46 with a pair of grabber arms 62, 66 (pg. 13, lines 26-31, and pg. 14, lines 1-3; Fig. 7(g) and 7(h)); (e) pulling the grasped top edges of the bag 46 apart (pg. 14, lines 1-3; Fig. 7(g) and 7(h)); (f) delivering the bag 46 to a sealing apparatus

120 (pg. 14, lines 3-12; Fig. 7(i) in part); and (g) sealing the bag 46 (pg. 14, lines 13-15 (not shown)), wherein step (f) includes the steps of providing a pair of finger assemblies 64, 67 (pg. 11, lines 26-31; Fig. 2-3 and 7) and moving the finger assemblies 64, 67 up, over, and down over the top edges of the bag 46 (pg. 12, lines 7-28; Fig. 7).

Claim 49 depends from independent claim 48 and provides for the further step of moving the finger assemblies 64, 67 away from each other to close the opening of the bag 46 (pg. 11, lines 19-31, and pg. 14, lines 1-3; Fig. 7).

Claim 50 also depends from independent claim 48 and covers the further step of moving the bag 46 toward the sealing apparatus 120 while the finger assemblies 64, 67 are moving away from each other (pg. 14, lines 1-12; Fig. 7(i) in part).

Claim 51 is also a dependent claim from independent claim 48 that provides for the further feature that step (e), pulling the grasped top edges of the bag 46 apart, occurs during step (f), delivering the bag 46 to the sealing apparatus 120 (pg. 14, lines 1-12; Fig. 7).

Claim 58 is an independent method claim and provides for a method of filling a bag 46 with a material and sealing a bag 46

including the steps of: (a) providing an empty collapsed bag 46 on a bag holder 44, 202 (pg. 10, lines 5, 6, 9, 14, 16, 18, 22 and pg. 13, line 21; Fig. 1, 3 and 7-10); (b) filling the bag 46 with material (pg. 13, lines 25-26; Fig. 7(c)-(f)); (c) grasping the opposed top edges of the bag 46 with a pair of finger assemblies 64, 67 that move inwardly and down to grasp the top edges of the bag 46, the motion being with respect to the bag 46 (pg. 13, lines 26-31 and pg. 14, lines 1-3; Fig. 7); (d) delivering the bag to a sealing apparatus 120 (pg. 14, lines 3-12; Fig. 7(i) in part); and (e) sealing the bag 46 (pg. 14, lines 13-15 (not shown)).

Claim 59 depends from independent claim 58 and provides for the further step of moving the finger assemblies 64, 67 away from each other to close the opening of the bag 46 (pg. 11, lines 19-31 and pg. 14, lines 1-3; Fig. 7(i) in part).

Finally, claim 60, is a dependent from claim 58 and provides for the further step of moving the bag 46 toward the sealing apparatus 120 while the finger assemblies 64, 67 are moving away from each other (pg. 14, lines 1-12; Fig. 7).

VI. GROUNDS OF REJECTION TO BE REVIEWED

There are two grounds of rejection to be addressed by the Honorable Board. The first ground relates to 35 U.S.C. 112 and whether claims 48-51 and 58-60 fail to comply with the written description requirement. The Examiner alleges the instant application does not disclose and/or teach:

- Providing a pair of finger assemblies and moving the finger assemblies up, over, and down over the top edges of the bag (claim 48);
- Moving the bag toward the sealing apparatus while the finger assemblies are moving away from each other (claims 50 & 60);
- Grasping the opposed top edges of the bag with a pair of grabber arms (claim 48);
- Pulling the grasped top edges of the bag apart (claim 48);
- Moving the finger assemblies away from each other to close the opening of the bag (claims 49 & 59);
- Pulling the grasped edges of the bag apart while delivering the bag to a sealing apparatus (claim 51);
- Grasping the opposed top edges of the bag with a pair of finger assemblies that move inwardly and down to grasp the top edges of the bag (claim 58).

The second ground of claim rejection relates to 35 U.S.C. 102 (a) for claims 48-51 and 58-60 and the Examiner's position that these claims are anticipated by Gates et al. (U.S. 6,550,226). The Examiner alleges that claims 48-51 and 58-60 contain subject matter which was not supported by the instant specification and the originally filed specification of the parent Application No. 09/890,083 and that they form new subject matter resulting in the lack of entitlement to the filing date of the parent Application No. 09/890,083 or PCT/CA00/001114 or Canada 2,262,276.

VII. ARGUMENT

The Final Rejection

REJECTION UNDER 35 U.S.C. 112

Claims 48-51 and 58-60 are finally rejected under 35 USC 112 as failing to comply with the written description requirement. The claims contain subject matter alleged by the Examiner not to be described in the instant application.

In support of the rejection of claims 48-51 and 58-60, the Examiner states as follows:

"The instant specification and drawings do not disclose and/or teach:

- Providing a pair of finger assemblies and moving the finger assemblies up, over, and down over the top edges of the bag (claims 48);
- Moving the bag toward the sealing apparatus while the finger assemblies are moving away from each other (claims 50 and 60);
- Grasping the opposed top edges of the bag with a pair of grabber arms (claim 48);
- Pulling the grasped top edges of the bag apart (claim 48);
- Moving the finger assemblies away from each other to close the opening of the bag (claims 49 & 59);
- Pulling the grasped edges of the bag apart while delivering the bag to a sealing apparatus (claim 51);
- Grasping the opposed top edges of the bag with a pair of finger assemblies that move inwardly and down to grasp the top edges of the bag (claim 58)."

The rejection is without basis.

Claims 48-51 and 58-60 Are Clearly Supported by the Specification

The Appellant submits that the Examiner improperly rejected the Appellant's arguments in the response to the Final Action. The Appellant further submits that the written description of the invention provides full, clear and concise terms readily supporting the subject matter of the claims.

More specifically, with respect to the claim construction of independent claim 48 of the patent application proposed by the Appellant, the following analysis will be of assistance. The underlined text indicates those elements deemed contentious by the Examiner as allegedly lacking support by the Appellant's disclosure.

Claim 48	Present (Y/N)	Figure	Element
(a) providing an empty and collapsed bag on a bag holder	Y	1, 3, 7(a)-(I), 8, 9, 10	46,44,202
(b) opening the bag;	Y	2,7(b)	46
(c) filling the bag with material;	Y	7(c)-(f)	28,46
(d) <u>grasping the opposed top edges of the bag with a pair of grabber arms;</u>	Y	7(g)-(h)	46,62,66
(e) <u>pulling the grasped top edges of the bag apart;</u>	Y	7(g)-(h)	46
(f) delivering the bag to a sealing apparatus; and,	Y	7(i) in part	46,120
(g) sealing the bag wherein step (f) includes the steps of providing a pair of "finger assemblies" moving the finger assemblies up, over and down over the top edges of the bag.	Y	not shown	120
	Y	7(a)-(i)	62,64,66,67
	Y	2,3	46

Clearly, as shown in the above Table, all of the elements of claim 48 are covered in the description of Appellant's present invention.

The step of "Grasping the opposed top edges of the bag with a pair of grabber arms" in claim 48 is identified by the Examiner as lacking support in the disclosure. The Appellant would like

to point out that the text specifically provides at page 14, lines 1-3, that the *inner arms 66* of the gripper assembly 50 *diverge for*

"...gripping opposing corners of the bag between the respective inner and outer fingers 64 and 67 as seen in Figure 7(h)." [Emphasis added.]

Clearly, from the above statement, the inner arms function to grasp the opening of the bag 46 "with a pair of grabber arms". Without clear direction from the Examiner, and presuming that it is being suggested that the grabber arms do not "grab" the bag itself, this argument ignores the fact that the grabber arms and finger assemblies are integral parts with each other and that control of the grabber arms is in part for the functional purpose of moving the finger assemblies at the end of the grabber arms to grasp the bag. In view of the above, it is clear that this step is more than adequately supported by the instant specification and the Examiner's rejection on this ground is without basis.

Further, with respect to claim 48, the Examiner is of the position that the step of "Pulling the grasped top edges of the bag apart" is absent from the disclosure. As set out in the above paragraph, the disclosure clearly supports grasping the top edges of the bag. In addition, the Examiner's position is clearly refuted by page 14, lines 1-3, of the instant specification which states that the "...inner arms 67 [sic]..." are

"...thereby drawing taut the mouth of the bag..." Accordingly, pulling the grasped top edges of the bag apart (by pulling taut the mouth of the bag) is well supported by the instant specification and the Examiner's rejection is without basis.

As a final point, the Examiner's assertion that the specification does not disclose the step of "Moving the finger assemblies up, over and down over the top edges of the bag" is inaccurate. The gripper assembly 50 is taught as being movable in three axis, namely laterally, longitudinally and vertically. The function and relation of the gripper assembly 50, its grabber arms 62, 66 and the downwardly depending fingers 64, 67 of the grabber arms, with respect to the three axis is found explicitly detailed in the disclosure of the instant application at page 12, lines 7-10, and 23-28, at page 13, lines 26-31 and is illustrated in Figures 7(a)-(i). Thus, the Examiner's rejection has no basis.

More particularly, the Examiner states that the *finger assemblies* of the present invention only retract laterally as seen in Figure 7(i) to transfer the bag 46 longitudinally to the conveyor station 54. The Examiner refers to page 14, lines 3-5, and the *gripper assembly* movements. However, at page 12 of the present application, lines 23-28, it is disclosed that:

"*Lateral reciprocating movement of the gripper assembly 50 relative to the carriage 52 is achieved by means of slidable movement of the beam 96 within the second sleeve 94, which in turn is driven by a pneumatic cylinder 98 linking the respective members. Vertical movement of the gripper assembly 50 is achieved by operation of the pneumatic cylinder 92.*" [Emphasis added.]

At page 13, line 26-31, the disclosure reads as follows:

"...As the hopper is discharging the commodity, the bag gripper assembly 50 *advances laterally towards the hopper 28, seen in Figures 7(c)-(e), and subsequently downwardly, as seen in Figure 7(f),* such that the downwardly depending fingers 67 of the inner arms 66 extend into the open mouth of the bag 46." [Emphasis added.]

It is clear that the gripper assembly 50 cannot advance laterally and subsequently downwardly on a continuous basis and that upward movement of the gripper assembly (e.g. the arms 62, 66 and fingers 64, 67) must be completed during the cycle. That is, it would be clear to a person skilled in the art that the bag gripper assembly 50 would in fact advance *laterally* towards the hopper 28 subsequently *downwardly*, such that the fingers 64, 67 of both the inner 62 and the outer arms 66 of the gripper assembly 50 grasp the bag 46, laterally withdraw the bag 46 from the area below the hopper 28 before transferring the bag 46 to the conveyor station 120 and subsequently moving *upwardly* into position for the next bag 46.

In light of the above, it is clear that all of the elements of claim 48 that were identified by the Examiner as not being disclosed by the present invention are in fact disclosed. Accordingly, claim 48 meets all of the requirements under 35 U.S.C. 112 and the Examiner's rejection of claim 48 is unfounded.

Turning now to dependent claim 49, the Examiner's position is that the step of "Moving finger assemblies away from each other" does not occur because the finger assemblies 64, 67 of the present invention are fixedly mounted to the gripper assembly 50. In fact, the inner arms 66 are movable relative to the outer arms 62 of the gripper assembly 50 and this relationship is supported on page 11, lines 19-31. Further, the actual movement of the inner arms 66 relative to the outer arms 62 is detailed on pg. 14, lines 1-3 and is also shown in Figures 7(a)-(i).

More particularly, the finger assemblies 64 and 67 are described on page 11, lines 26 to 31, which states that:

"The inner arms 66 are reciprocate between a converged first position, shown in Figure 7(a), wherein the fingers 67 of the inner arms 66 are spaced substantially apart from the fingers 64 of the fixed outer arms 62, and a second diverged position shown in Figure 7(b), wherein the respective fingers 64 and 67 of the inner and outer arms meet to clampingly engage a bag 46 therebetween." [Emphasis added.]

The above text clearly teaches that the finger assemblies are movable towards and away from each other and any suggestion otherwise is unfounded. Accordingly, the step of "Moving the finger assemblies 64, 67 away from each other" is disclosed in the present invention and the Examiner's rejection of claim 49 is without basis.

Claim 50 is rejected by the Examiner on similar grounds as claim 49, namely that the step of "Moving the bag toward the sealing apparatus while the finger assemblies are moving away from each other" is allegedly not supported by the teachings of the disclosure. The feature of the finger assemblies being movable away from each other is clearly found supported as set out in the previous paragraph herein above. Further, at page 14, lines 1-12, it is clearly taught that the inner arms 66, having fingers 67, diverge to draw taut the mouth of the bag 46. The bag 46 is transferred to a conveyance station 54 and then subsequently, while the arms 66 have drawn the bag taut (see Fig. 7(i)), to a sealing station 120. Thus, there is clear support for all of the elements of claim 50 and the Examiner's rejection of claim 50 also has no basis.

With respect to the Examiner's position regarding claim 51, namely that the bag 46 is not grasped by its top edges with the

grabber arms and so also cannot be pulled by the pair gripper arms 62 and 66, it is clear that the Examiner's position is incorrect.

Page 14, lines 1-3, of the disclosure, as outlined herein with respect to claim 48, specifically describes "gripping" the opposed corners of the bag 46 and it has been clearly shown that the bag is grasped with the grabber arms 62, 66 having finger assemblies 64, 67. The gripped bag 46, is drawn taut and the bag remains in this "pulled taut position" during/while the bag 46 is being transferred to the sealing station 120. It could be argued that the scope of the claim infers the bag 46 is being pulled from a "relaxed position" to a "taut position" while it is being transferred to the sealing station 120. However, there is no support for this argument. This argument suggests that the terms "from an open to a closed and pulled apart position" form part of the claim and, given that these terms do not properly form part of the claim, the claim cannot be construed to include these terms. The claim states that the top edges of the bag 46 are grasped and pulled apart, e.g. pulled taut, during conveyance to the sealing station 120. These elements are clearly taught in the present application at pg. 14, lines 1-12, as set out in the above paragraph with respect to claim 50. Accordingly, the

subject matter of claim 51 is clearly found to be supported by the specification of the instant application.

The claim construction for independent claim 58 of the patent application, as proposed by the Appellant, will be assisted with the following analysis. The Table below identifies the text deemed contentious by the Examiner as allegedly lacking support by the disclosure of the present application.

Claim 58	Present (Y/N)	Figure	Element
(a) providing an empty and collapsed bag on a bag holder	Y	1, 3, 7(a)-(i), 8, 9, 10	46, 44, 202
(b) filling the bag with material;	Y	7(c)-(f)	28, 46
(c) <u>grasping the opposed top edges of the bag with a pair of finger assemblies that move inwardly and down to grasp the top edges of the bag</u> , the motion being with respect to the bag;	Y	7(a)-(i)	46, 64, 67
(d) delivering the bag to a sealing apparatus; and,	Y	7(i) in part	46, 120
(e) sealing the bag.	Y	not shown	120

Claim 58 is rejected by the Examiner on a ground similar to that raised in claim 48, namely that the specification teaches at page 11, lines 14-31, that the finger assemblies are fixedly mounted to the gripper assembly and therefore they allegedly do

not "Move inwardly and down to grasp the top edges of the bag".

The Appellant would again like to point out that the text clearly supports three axis of movement for the gripper assembly 50 at page 12, lines 7-10 and 23-28, page 13, lines 26-31 and is illustrated in Figures 7(a)-(i). The movement of the gripper assembly 50 results in the finger assemblies 64, 67 moving inwardly (laterally towards the hopper 28) and downwardly such that the fingers 64, 67 extend into the bag 46. In light of these facts the Examiner's rejection of claim 58 is without basis.

Claims 59 and 60 are dependent from independent claim 58 and provide for features and elements similar to those of claims 49 and 50. Accordingly, the Appellant believes that the features and elements for each of claims 59 and 60 have been shown to be properly supported herein above with respect to claims 49 and 50 and that it has been shown that the Examiner's rejection of claims 59 and 60 are also clearly without basis.

The Appellant believes it has been clearly shown that the Examiner erred in failing to find the subject matter of claims 48-51 and 58-60 supported in the disclosure in conformance with 35 U.S.C. 112.

REJECTION UNDER 35 U.S.C. 102

In further support of the rejection of claims 48-51, and 58-60, the Examiner states:

"Because claims 48-51 and 58-60 contains subject matter which was not supported by the instant specification and the originally filed specification of the parent Application No. 09/890,083, they form new matter and thus are not entitled to the filing date of the parent Application No. 09/890,083 or PCT/CA00/00114 or Canada 2,262,276."

The rejection is also without basis.

The Priority Date is Properly Claimed

The present application is a divisional application and claims priority under 35 U.S.C. Section 120 of the PCT/CA00/00114, filed February 7, 2000 and also under 35 U.S.C. Section 119 of Canadian Patent Application Number 2,262,276, filed February 15, 1999.

35 U.S.C. 102 (a) forms the basis of the Examiner's rejection for claims 48-51 and 58-60 of the present application as being anticipated in view of Gates et al (U.S. 6,550,226). The Examiner states that the subject matter of the claims forms new subject matter and as such the claims are not entitled to the filing date of the parent application. However, the Appellant has clearly shown herein above that there is significant detailed

support for each element of the rejected claims in the Appellant's specification. Moreover, the Examiner, having determined that the inventions are separate and distinct cannot ignore the plain meaning of the statute in order to serve the Examiner's opinion for rejection of the claims. Accordingly, the merits of the Examiner's rejection of the subject matter of claims 48-51 and 58-60 under 35 U.S.C. 102 (a) has no factual basis.

That the Examiner failed definitively to construe claims 48-51 and 58-60 of the patent application is plain enough. In addition, the Examiner erred in this case because the Examiner did not apply the proper priority claim date to the claims of the present patent application.

VIII. CONCLUSION

In summary, support for the claims in issue, namely claims 48-51 and 58-60, is clearly established and finds particular application to these factual circumstances; i.e., enabling Appellant to obtain patent coverage consistent with the original disclosure. The Examiner's Final Rejection based on 35 USC 112 is without legal or factual basis, given the fact that the limitations upon which the Examiner focuses as not being supported in the original disclosure clearly are found supported.

Accordingly, the rejection of claims 49-51 and 58-60 under 35 U.S.C. 102 (a) has also been improperly applied. The Final Rejection of the Examiner is accordingly improper and should be reversed by the Honorable Board.

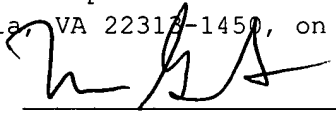
Respectfully submitted,
Thomas DROOG ET AL-1 (PCT) (DIW)

COLLARD & ROE, P.C.
1077 Northern Boulevard
Roslyn, New York 11576
(516) 365-9802

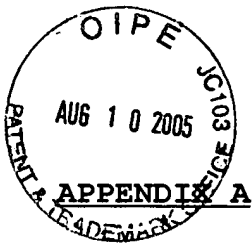
Allison C. Collard, Reg. No. 22,532
Edward R. Freedman, Reg. No. 26,048
Frederick J. Dorchak, Reg. No. 29,298
Attorneys for Applicants

Enclosure: Appendix - Claims on Appeal

I hereby certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, PO Box 1450 Alexandria, VA 22314-1450, on August 8, 2005.


Maria Guastella

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CLAIMS ON APPEAL

Claim 48.

A method of filling a bag with a material and sealing a bag;
the method comprising the steps of:

- (a) providing an empty collapsed bag on a bag holder;
- (b) opening the bag;
- (c) filling the bag with material;
- (d) grasping the opposed top edges of the bag with a pair
of grabber arms;
- (e) pulling the grasped top edges of the bag apart;
- (f) delivering the bag to a sealing apparatus; and
- (g) sealing the bag,

wherein step (f) includes the steps of providing a pair of
finger assemblies and moving the finger assemblies up, over, and
down over the top edges of the bag.

Claim 49.

The method of claim 48, further comprising the step of
moving finger assemblies away from each other to close the
opening of the bag.

Claim 50.

The method of claim 48, further comprising the step of
moving the bag toward the sealing apparatus while the finger

assemblies are moving away from each other.

Claim 51.

The method of claim 48, wherein step (e) is being conducted while step (f) is being conducted.

Claim 58.

A method of filling a bag with a material and sealing a bag; the method comprising the steps of:

- (a) providing an empty collapsed bag on a bag holder;
- (b) filling the bag with material;
- (c) grasping the opposed top edges of the bag with a pair of finger assemblies that move inwardly and down to grasp the top edges of the bag, the motion being with respect to the bag;
- (d) delivering the bag to a sealing apparatus; and
- (e) sealing the bag.

Claim 59.

The method of claim 58, further comprising the step of moving finger assemblies away from each other to close the opening of the bag.

Claim 60.

The method of claim 58, further comprising the step of moving the bag toward the sealing apparatus while the finger assemblies are moving away from each other.